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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 RESIDENT COUNCILS OF
10 WASHINGTON, et al.,

11 Plaintiffs,

12 v.

13 TOMMY G. THOMPSON, Secretary of
14 United States Department of Health and
15 Human Services,

16 Defendant.

17 No. C04-1691Z

18 ORDER

19 This matter comes before the Court on the Defendant's motion to dismiss. For the
20 reasons outlined herein, the Court GRANTS IN PART AND DENIES IN PART the
21 Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, docket no. 63.

22 **I. BACKGROUND**

23 **A. The Parties and the Present Action**

24 Plaintiffs are a group of individual nursing home residents and organizations
25 representing the interests of nursing home residents and their families. First Amended
26 Complaint, docket no. 14, ¶¶ 7-14. Four of the individual Plaintiffs, Louise Clark, Dan
Fruichantie, Dolores Shafer, and Mike Swope, currently reside in Washington nursing
homes. Id. at ¶¶ 10, 11, 13, 14. The remaining individual Plaintiff, Wilbert Schroeder,
resides in a Michigan nursing home. Id. at ¶ 12. The organizational Plaintiffs in this case
are Resident Councils of Washington ("Resident Councils"), the Washington State Long-

1 Term Care Ombudsman Program, and the Michigan Campaign for Quality Care. Id. at ¶¶ 7-
2 9. Resident Councils is a non-profit organization whose membership consists of nursing
3 home residents and whose primary goal is to empower residents and protect nursing home
4 quality of care. Id. at ¶¶ 7, 48. The Washington State Long-Term Care Ombudsman
5 Program is a statutorily formed organization that represents Washington long-term care
6 facility residents and whose mission is to promote the interests, well-being and rights of its
7 members. Id. at ¶¶ 8, 55; see also Wash. Rev. Code 70.129.010-090; Wash. Admin Code
8 365-18-010. The Michigan Campaign for Quality Care is a non-partisan, grassroots group
9 whose membership consists primarily of the family members of current and former nursing
10 home residents and whose mission includes protecting nursing home residents' well-being.
11 First Amended Complaint, docket no. 14, ¶¶ 9, 60. Plaintiffs seek declaratory, injunctive,
12 and mandamus relief prohibiting the Defendant from implementing regulations which would
13 permit the use of paid feeding assistants in nursing homes and ordering the Defendant to
14 rescind the regulations. Id. at ¶ 5.

15 **B. The Feeding Assistant Regulations**

16 The regulations create a "paid feeding assistant" job category within nursing homes
17 and allow states to opt in and permit skilled nursing facilities to use feeding assistants,
18 consistent with minimum state and federal requirements. Id. at ¶¶ 37-38; see also 42 C.F.R.
19 483.35(h). Feeding assistants may work with patients after receiving as little as eight hours
20 of training, which is significantly less than the 75 hours required by law for certified nursing
21 assistants (C.N.A.s) employed in such homes. First Amended Complaint, docket no. 14, ¶¶
22 26, 37; see also 42 C.F.R. § 483.160; 42 U.S.C. §§ 1395i-3(b)(5)(A), 1395i-3(e)(1), 1395i-
23 3(f)(2). The regulations prohibit feeding assistants from assisting residents who have been
24 identified by a charge nurse as having complicated feeding problems, including difficulty
25 swallowing. 42 C.F.R. § 483.35(h)(3). The United States Department of Health and Human
26 Services estimates that up to twenty percent of the 17,000 nursing homes in the United States

1 participating in Medicare or Medicaid will employ feeding assistants. First Amended
 2 Complaint, docket no. 14, ¶ 40; see also 68 Fed. Reg. 55,536 (Sept. 26, 2003). Prior to the
 3 feeding assistant regulations, the Department of Health and Human Services considered the
 4 feeding of residents to be a “nursing related service” under the federal Nursing Home
 5 Reform Law and the law required that this service be performed by a licensed health care
 6 professional, a registered dietician, a C.N.A., or a volunteer. First Amended Complaint,
 7 docket no. 14, ¶ 28; see also 42 U.S.C. 1395i-3(b)(5)(F). Washington has adopted the
 8 feeding assistant regulations. See id. at ¶¶ 42, 43; see also Washington Department of
 9 Social and Health Services, Aging and Disability Services Administration: Memorandum NH
 10 #2004-004 (Feb. 23, 2004). Michigan has not formally adopted the regulations but plans to
 11 implement a pilot program to evaluate the use of feeding assistants. First Amended
 12 Complaint, docket no. 14, ¶ 44. However, Plaintiffs alleged that dining assistants would
 13 begin working in Michigan nursing homes in January, 2005. Id.

14 **C. Impact of Regulations on Plaintiffs**

15 Plaintiffs allege that the feeding assistant regulations place nursing home residents,
 16 including members of the Washington organizations, at risk of future physical injury. See
 17 Plaintiffs' First Amended Complaint, docket no. 14, ¶¶ 47, 51, 57. Specifically, Plaintiffs
 18 allege that: (1) under the regulations, paid feeding assistants may assist residents after
 19 receiving as little as eight hours of training; (2) this is significantly less than the training
 20 required for a C.N.A.; (3) prior to the regulations, feeding assistance was considered a
 21 nursing related task and when performed by a staff member required at least the training of a
 22 C.N.A.; (4) some nursing homes have begun to employ paid feeding assistants; (6) it is
 23 estimated that up to forty to sixty percent of institutionalized older persons suffer swallowing
 24 disorders and that such disorders go unrecognized in up to one-fourth or one-fifth these
 25 cases; (7) residents have encountered dangerous health problems during mealtimes due to
 26 hurried or insufficiently trained aides. Id. at ¶¶ 25, 26, 37, 40, 43-47. Some of the individual

1 Plaintiffs allege that they fear that the lesser trained feeding assistants will be unprepared to
 2 care for nursing home residents. Id. at ¶ 63-67. Although all individual Plaintiffs allege that
 3 they fear a general reduction in the quality of their nursing home care resulting from the
 4 replacement of nursing staff with feeding assistants, only one, Dolores Shafer, alleges that
 5 she currently relies on nursing home staff for feeding assistance. Id. Ms. Shafer also alleges
 6 that she currently suffers from a swallowing disorder. Id. at ¶ 66.

7 All organizations allege that implementation of the regulations will force them to
 8 devote scarce time, effort, staff, and other resources to alert nursing home residents and
 9 others to the feeding assistant regulations, to the harm that will be caused by the use of
 10 feeding assistants in nursing homes, and to advocate for changes in state policy. Id. at ¶¶ 52,
 11 58, 61. All organizations also allege that these resources could be used for other projects to
 12 further the organizations' missions. Id. Plaintiff Michigan Campaign for Quality Care
 13 claims that it has already spent resources in its participation in a Michigan workgroup
 14 convened for the development of Michigan's pilot program. Id. at ¶ 61. The Michigan
 15 organization opposes the use of feeding assistants because such use will result in care being
 16 provided by inadequately trained staff and the regulations interfere with and impede the
 17 mandate of the Michigan organization. Id. at ¶¶ 60, 62.

18 **II. DISCUSSION**

19 **A. Standard of Review**

20 Defendant moves pursuant to Fed. R. Civ. Proc. 12(b)(1) to dismiss this action for
 21 lack of subject matter jurisdiction. The substance of Defendant's motion is that subject
 22 matter jurisdiction is not present because the Plaintiffs do not have standing to bring this suit.
 23 "Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of
 24 America, 511 U.S. 375, 377 (1994). "[T]hose who wish to invoke the jurisdiction of the
 25 federal courts must satisfy the threshold requirement of Article III . . . by alleging an actual
 26 case or controversy." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). Because this

1 motion is brought under Fed. R. Civ. P. 12(b), the Court must presume that the general
 2 allegations in the complaint encompass the specific facts necessary to support those
 3 allegations. See Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 104
 4 (1998). This action may go forward so long as any one Plaintiff has standing. See Watt v.
 5 Energy Action Educational Found., 454 U.S. 151, 160 (1981).

6 **B. Standing Requirements**

7 Defendant argues that all Plaintiffs have failed to establish standing under Article III
 8 of the Constitution. “[S]tanding is an essential and unchanging part of the case-or-
 9 controversy requirement of Article III.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560
 10 (1992). “To satisfy the Article III case or controversy requirement, a litigant must have
 11 suffered some actual injury that can be redressed by a favorable judicial decision.” Iron
 12 Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1984). Standing is a judicially created
 13 doctrine and “unlike other jurisdictional doctrines, focuses on the party seeking to get his
 14 complaint before a federal court and not on the issues he wishes to have adjudicated.”
 15 Pritikin v. Department of Energy, 254 F.3d 791, 798 (9th Cir. 2001) (internal citations
 16 omitted). The issue in the present case is whether individual and organizational Plaintiffs
 17 have alleged facts sufficient to show Article III standing.

18 **C. Individual Plaintiffs**

19 To have standing, the individual Plaintiffs in this case must allege facts sufficient to
 20 show three elements:

21 First, the plaintiff must have suffered an “injury in fact”—an invasion of a
 22 legally protected interest which is (a) concrete and particularized and (b) actual
 23 or imminent, not conjectural or hypothetical. Second, there must be a causal
 24 connection between the injury and the conduct complained of—the injury has
 25 to be fairly traceable to the challenged action of the defendant, and not the
 26 result of the independent action of some third party not before the court.
 27 Third, it must be likely, as opposed to merely speculative, that the injury will
 28 be redressed by a favorable decision.

29 Defenders of Wildlife, 504 U.S. at 560-61 (internal citations and quotations omitted); see
 30 also Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 103-104 (1998)

1 (stating that this “triad of injury in fact, causation, and redressability constitutes the core of
 2 Article III’s case-or-controversy requirement”). Defendant argues that individual Plaintiffs
 3 have failed to allege facts sufficient to establish all three of these elements.

4 The “Supreme Court has consistently recognized that threatened rather than actual
 5 injury can satisfy Article III standing requirements.” Harris v. Board of Supervisors, Los
Angeles County, 366 F.3d 754, 761 (9th Cir. 2004) (internal citations omitted). To meet the
 6 required showing for standing when standing is based upon the threat of future injury, a
 7 plaintiff must show that the threat of injury is both real and immediate, not conjectural or
 8 hypothetical. Lyons, 461 U.S. at 102. “[H]ypothetical, speculative or other ‘possible future’
 9 injuries do not count in the standing calculus.” Schmier v. U.S. Court of Appeals for the
 10 Ninth Circuit, 279 F.3d 817, 821 (9th Cir. 2002). Mere allegations of a possible future
 11 injury do not satisfy the Article III requirements. Whitmore v. Arkansas, 495 U.S. 149, 158
 12 (1990). Although the required degree of threat has never been precisely articulated, what “a
 13 plaintiff must show is not a probabilistic estimate that the general circumstances to which the
 14 plaintiff is subject may produce future harm, but rather an individualized showing that there
 15 is ‘a very significant possibility’ that the future harm will ensue.” Nelsen v. King County,
 16 895 F.2d 1248, 1250 (9th Cir. 1990) (internal citations omitted). Analysis of the threat of
 17 future injury must be individualized and must take into account all contingencies that may
 18 arise in an individual case before future harm will ensue. See id. at 1251.

20 Here, the Court finds that Plaintiffs have failed to allege sufficient facts to make an
 21 “individualized showing” that there is “a very significant possibility that the future harm will
 22 ensue.” See id. at 1250. The chain of contingencies that must occur for these individuals to
 23 face any threat of future injury is simply too speculative. See Lee v. State of Oregon, 107
 24 F.3d 1382, 1388-89 (9th Cir. 1997). Plaintiff Wilbert Schroeder resides in a state that has
 25 not yet adopted the regulations; therefore, on the facts alleged does not face an imminent
 26 threat of being fed by a feeding assistant. The mere implementation of a pilot program in

1 Michigan nursing homes is not a sufficient risk where no facts are alleged as to the number
2 and location of pilot facilities. In addition, Plaintiffs Wilbert Schroeder, Louise Clark, Dan
3 Fruichantie, and Mike Swope do not allege that they currently rely on nursing staff for
4 assistance in eating. Accordingly, it is unknown if or when in the future these individual
5 Plaintiffs will face any alleged risk of being fed by feeding assistants. Finally, even though
6 Plaintiff Dolores Shafer currently lives in a nursing home in a state that has adopted the
7 regulations and alleges that she relies on nursing staff for feeding assistance, this Plaintiff
8 also alleges that she currently suffers from a swallowing disorder. Under the regulations,
9 this Plaintiff would be ineligible for feeding assistant aid. See 42 C.F.R. § 483.35(h)(3).

10 Plaintiffs have also failed to allege facts sufficient to show that the claimed future
11 injury of a general decline in the quality of nursing home care for residents as a whole is any
12 less hypothetical. Even presuming that the general allegations in the complaint encompass
13 the specific facts necessary to support these allegations, the alleged injury is too hypothetical
14 to meet the requirement of an injury in fact. See Steel Company, 523 U.S. at 104. Each
15 individual Plaintiff alleges a subjective fear that the use of feeding assistants in his or her
16 facility will result in decreased quality of care due to resulting changes in nursing home
17 staffing and inadequate training of the new assistants. Such alleged hypothetical future
18 injuries based on subjective fears and speculative future events are not sufficient to meet the
19 Article III standing requirement of a certainly impending injury. See Lee, 107 F.3d at 1388-
20 89. For these reasons, the Court finds that the individual Plaintiffs have failed to meet their
21 required showing of injury in fact. Because the Court finds that the injury in fact element
22 has not been met, the Court does not reach the standing elements of causation and
23 redressability. The Court concludes that the individual named Plaintiffs do not have standing
24 to pursue this action.

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1 **D. Organizational Plaintiffs**

2 An association may seek standing to bring suit in two ways: (1) on behalf of its
 3 individual members; or (2) on the organization's own behalf. Warth v. Seldin, 422 U.S. 490,
 4 511 (1975). Here, Defendants argue that the organizational Plaintiffs have failed to show
 5 they have standing on either of these grounds.

6 **1. Washington Organizations**

7 “An association has standing to bring suit on behalf of its members when its members
 8 would otherwise have standing to sue in their own right, the interests at stake are germane to
 9 the organization’s purpose, and neither the claim asserted nor the relief requested requires
 10 the participation of individual members in the lawsuit.” Friends of the Earth, Inc. v. Laidlaw
 11 Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). An organization suing on behalf of its
 12 members must allege facts sufficient to show, at a minimum, that its members would
 13 otherwise have standing to sue in their own right. See Hunt v. Washington State Apple
 14 Advertising Comm'n, 432 U.S. 333, 345 (1977). For the purposes of the standing analysis,
 15 the constituents of the statutorily established Washington Long-Term Care Ombudsman
 16 Program are treated as the functional equivalent of members. See Oregon Advocacy Center
 17 v. Mink, 322 F.3d 1101, 1112 (9th Cir. 2003).

18 Plaintiffs allege that Washington has adopted the feeding assistant regulations, has
 19 developed a training program and that an estimated twenty percent of Medicare and
 20 Medicaid participating nursing homes will employ paid feeding assistants. In addition,
 21 Plaintiffs allege that some nursing homes have already begun to employ such assistants. The
 22 complaint allegations include estimates that between forty to sixty percent of
 23 institutionalized older persons have swallowing disorders and that these disorders may go
 24 undiagnosed in up to one-fifth to one-fourth of residents with such disorders. Finally,
 25 Plaintiffs allege that lesser trained paid feeding assistants will cause physical harm to the
 26 Washington organizations’ members who rely on feeding assistance. Based on these

1 allegations, it is not pure conjecture that there are members of the Washington organizations
 2 who face a very significant possibility that the alleged future harm will ensue. See California
 3 Rural Legal Assistance, Inc. v. Legal Services Corporation, 917 F.2d 1171, 1174-75 (9th Cir.
 4 1990) (finding that organization had standing to sue on behalf of members where complaint
 5 alleged facts sufficient to show that many of its members would be adversely affected even
 6 though such members were not specifically identified).

7 Plaintiffs have also alleged facts sufficient to meet the causation and redressability
 8 standing elements for these organizations' individual members. To meet the causation
 9 element, a plaintiff must show that there is a causal connection between the conduct
 10 complained of and the claimed injury. Defenders of Wildlife, 504 U.S. at 560. This means
 11 that the injury must be fairly traceable to the actions of the defendant. Central Delta Water
 12 Agency et al v. United States, 306 F.3d 938, 947 (9th Cir. 2002). In the determination of this
 13 element, the length of the chain of causation is not the issue, but rather the plausibility of the
 14 links that comprise the chain. See Nat'l Audubon Society, Inc. v. Davis, 307 F.3d 835, 849
 15 (9th Cir. 2002); see also Autolog Corp. v. Regan, 731 F.2d 25, 31 (D.C. Cir. 1984). Here,
 16 Plaintiffs allege that they will be fed by feeding assistants and harmed as a result. The Court
 17 finds that the plausibility of the links comprising the chain between the regulations and
 18 alleged injury is enough to show that the alleged injury could be fairly traceable to the
 19 regulations. See Nat'l Audubon Society, Inc., 307 F.3d at 849. The third and final standing
 20 inquiry, "redressability," requires a court to determine whether it possesses the ability to
 21 remedy the harm that a petitioner asserts. Citizens for a Better Forestry v. United States
 22 Dept. of Agriculture, 341 F.3d 961, 975-76 (9th Cir. 2003). In this case, the Court has the
 23 ability to determine whether the regulations are in conflict with and violate the provisions of
 24 the Nursing Home Reform Law. The Court finds that these Plaintiffs have met the third
 25 "redressability" element of standing because if such a determination is made nursing homes
 26 will not be authorized to employ feeding assistants and the harm the Plaintiffs assert will be

1 remedied. For these reasons, the Court concludes that Plaintiffs have alleged facts sufficient
 2 to show that individual members of the Washington organizations have standing to sue on
 3 their own behalf.

4 Finally, the facts alleged are sufficient to show that the interests at stake are germane
 5 to these organizations' purposes because the interest at stake in this case is the residents'
 6 physical safety, which is germane to both Washington organizations' purposes of protecting
 7 nursing home residents' well-being. See Columbia Basin Apartment Association v. City of
Pasco, 268 F.3d 791, 799 (9th Cir. 2001). In addition, neither the claim asserted nor the relief
 9 requested requires the participation of individual members in the lawsuit because the
 10 declaratory, injunctive, and mandamus relief sought in this case does not demand
 11 individualized proof on behalf of its members. Id. For these reasons, the Court concludes
 12 that the Washington organizations, Resident Councils and the Washington State Long-Term
 13 Care Ombudsman Program have standing to bring this action on behalf of their individual
 14 members. The Court does not reach the issue of whether these organizations would also
 15 have standing to sue on their own behalf.

16 **2. Michigan Organization**

17 Plaintiffs have failed to allege facts to show that the threatened future injury to any of
 18 the Michigan organization's members is "real and immediate" and not "conjectural or
 19 hypothetical." See Lyons, 461 U.S. at 102. The Michigan organization represents primarily
 20 family members of residents and no facts have been alleged to show that any of its members
 21 face imminent injury from feeding assistant regulations not yet formally adopted by
 22 Michigan. For these reasons, the Court concludes that the Michigan organization does not
 23 have standing to sue on behalf of its individual members because Plaintiffs have identified no
 24 member of this organization that would have standing to sue on his or her own behalf.

25 An organization is also permitted to sue on its own behalf if it can meet the Article III
 26 requirements of injury in fact, causation and redressability. See Havens Reality Corp. et al v.

1 Coleman, 455 U.S. 363, 378-79 (1982) (organization has standing to sue where it alleged
 2 such a personal stake in the outcome of the controversy as to warrant invocation of federal
 3 court jurisdiction). An organization may satisfy the Article III requirement of injury in fact
 4 by demonstrating: (1) frustration of its organizational mission; and (2) direct harm to its
 5 ability to provide services. See id. at 379; see also Smith v. Pacific Properties and
 6 Development Corp., 358 F.3d 1097, 1105 (9th Cir. 2004). Where the alleged harm is merely
 7 a setback to an organization's abstract social interests rather than a concrete and
 8 demonstrable injury to the organization's resources, the injury in fact requirement has not
 9 been met. See Havens, 455 U.S. at 379; see also Sierra Club v. Morton, 405 U.S. 727, 734-
 10 35 (1972) (no organizational standing where an organization alleges merely a special interest
 11 in a problem); Center for Law and Educ. v. Department of Educ., 396 F.3d 1152, 1162 (D.C.
 12 Cir. 2005) (no organizational standing present where the only service impaired is pure issue
 13 advocacy). Defendant argues that the Plaintiffs have not alleged facts sufficient to show that
 14 the alleged harm posed to the Michigan organization extends beyond mere issue advocacy.

15 Here, the underlying threatened harm to the Michigan organization's members is not
 16 certainly impending because the regulations have not yet been formally adopted in this state.
 17 As the underlying harm facing this organization's members is not imminent but is merely
 18 speculative, the Michigan organization's alleged injury of frustration of its organizational
 19 mission is more of a setback to its "abstract social interests" than "concrete and demonstrable
 20 harm" to its activities. See Havens, 455 U.S. at 379. Although Plaintiffs allege that the
 21 organization has devoted resources towards assisting in developing Michigan's pilot
 22 program, these activities amount to mere issue advocacy, rather than harm to the
 23 organization's ability to offer services to its members. See Center for Law and Educ., 396
 24 F.3d at 1161. For these reasons, the Court concludes that the Plaintiffs have failed to allege
 25 facts to show that the Michigan organization has standing to sue on behalf of its individual
 26 members or on behalf of itself.

E. Plaintiffs' Standing and the Administrative Procedure Act

2 Plaintiffs request judicial review of the Defendant’s actions. Plaintiffs argue that
3 Defendant has violated the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), in
4 promulgating a regulation that departs from agency precedent without a reasoned explanation
5 and without empirical support. In addition to the Article III standing requirements, a plaintiff
6 bringing an action under the APA must establish standing by showing that (1) there has been
7 final agency action adversely affecting the plaintiff, and (2) as a result, the plaintiff suffers
8 legal wrong or its injury falls within the “zone of interests” of the statutory provision the
9 plaintiff claims was violated. Lujan v National Wildlife Federation, 497 U.S. 871, 882-83
10 (1990). Plaintiffs Resident Councils and the Washington State Long-Term Care Ombudsman
11 Program have alleged sufficient facts to establish standing to challenge the agency’s actions
12 as arbitrary and capricious.

13 || III. CONCLUSION

14 Based on the foregoing, the Court GRANTS IN PART and DENIES IN PART the
15 Defendant's motion to dismiss for lack of subject matter jurisdiction, docket no. 63. The
16 motion to dismiss is GRANTED as to individual Plaintiffs Wilbert Schroeder, Louise Clark,
17 Dan Fruichantie, Mike Swope and Dolores Shafer and as to Plaintiff Michigan Campaign for
18 Quality Care and these Plaintiffs are dismissed from this action without prejudice. The
19 motion to dismiss is DENIED as to Plaintiffs Resident Councils and the Washington State
20 Long Term Care Ombudsman.

21 The Court renotes Plaintiffs' Motion for Summary Judgment, docket no. 50, and
22 Plaintiffs' Motion to Certify Class, docket no. 54, for consideration on May 27, 2005.

23 || IT IS SO ORDERED.

24 DATED this 2nd day of May, 2005.

Thomas S Zilly
Thomas S. Zilly
United States District Judge